Editor's note: Reconsideration granted; decision vacated -- See Gregory Anelon, Sr. (On Reconsideration), 60 IBLA 101 (Nov. 19, 1981)

GREGORY ANELON, SR.

IBLA 75-3 Decided August 1, 1975

Appeal from decision of Alaska State Office, BLM, rejecting Alaska Native allotment application, AA 6127.

Affirmed.

1. Alaska: Native Allotments

   The requirement of use and occupancy by an applicant under the Alaska Native Allotment Act contemplates possession at least potentially to the exclusion of all others and not mere intermittent use. Seasonal use for fishing, hunting and trapping within an area used for similar purposes by others without the consent of the applicant does not satisfy the requirements of the regulation that use shall be potentially to the exclusion of all others.

2. Secretary of the Interior -- Alaska: Native Allotments

   Where a Native allotment applicant has used the land applied for only for hunting, trapping and fishing and there are no improvements on the land, it is proper in the exercise of the Secretary's discretionary authority to reject the application to the extent it conflicts with a special land use permit issued to the Alaska Fish and Game Department for scientific purposes.

APPEARANCES: Henry N. Cavallera, Esq., of Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

This appeal arises from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 7, 1974, rejecting Gregory Anelon's Native allotment application filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), and the pertinent regulations, 43 CFR Subpart 2561. BLM rejected the application because the evidence was insufficient to show appellant had used the land for not less than five years in a manner potentially exclusive of all others. The decision also recited that it is within the proper exercise of the Secretary's discretion to reject an application in view of the circumstances.

An earlier application by appellant for an allotment on the same parcel of land was rejected in 1963 after a field examination failed to corroborate his statements of seasonal use from February 1 to May 30 in each year since 1950. When a field examination was conducted in June 1965 in connection with trade and manufacturing site of one Seiler on adjacent land, the examiner discerned no signs of use or evidence that appellant used or occupied the land under application.

Appellant's second application for allotment of this parcel was filed in 1971. He reiterates use of the land on a seasonal basis each year but now says his use began in 1940 and that his season of use was from May through September. In later statements submitted in support of his application, appellant and others assert that appellant uses the land from January or February to April or May. A field examination during 1973, again failed to corroborate the asserted use. The report shows that the Alaska Department of Fish & Game (ADFG) purchased the Seiler improvements on the T & M site and is occupying part of the land under this allotment application (together with other land) for scientific purposes pursuant to the authority of a special land use permit. BLM stated that the field examination found no physical evidence of appellant's use and occupancy and concluded that the other evidence of use and occupancy by Anelon is not sufficient to indicate substantial use and occupancy of the land to the potential exclusion of use by others. It held also that the Secretary's discretion is properly exercised to reject appellant's application.

In response to an inquiry by BLM, Seiler stated that he knew of no conflict with the T & M site during the life of that entry. He remarked that others intermittently used lands behind the T & M for fishing, hunting, etc., but no one had ever established a residence or constructed anything beyond a temporary camp site. ADFG employees volunteered that the general area, where the land under application is situated, is one of high public usage for sport and subsistence fishing, hunting, etc. In June 1973, BLM field examiners photographed several planes and fishermen in a camp set-up on the parcel under application.

Appellant has submitted his statement and that of others who support his use of the land for trapping, hunting and fishing. He argues that residency is not a requirement of the Allotment Act and that his use in customary native fashion is sufficient to entitle him to an allotment. In support, he cites the Secretarial guidelines of October 18, 1973. His use, he contends, fulfills the five-year occupancy requirement.

[1] The Allotment Act requires an applicant to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." The regulations, 43 CFR 2561.0-5(a) defines --

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

The Secretarial guidelines of October 18, 1973, liberalized the evidence which may be considered in connection with an allotment application and emphasized that --

> In all adjudications, the existing regulations relative to Native Allotment applications and prior departmental final decisions concerning the Native Allotment Act are to be controlling where pertinent.

And, the burden to present clear and credible evidence to establish entitlement is upon the applicant. Maxie Wassillie, 17 IBLA 416 (1974); John Nanalook, 17 IBLA 353 (1974).

Even if we accept all of appellant's assertions as established (and ignore the contraindications therein), the evidence of record, including the reports of three field examinations, the Seiler statement and the statements of ADFG employees, is convincing that since 1962 appellant has not used the land to the exclusion of other persons but at most, only used the land intermittently in the same fashion as any other fisherman or hunter who returns to a particularly favorite site during the course of a season. This is not the manner of use and occupancy contemplated by the regulations. Solicitor's Opinion, 71 I.D. 340 (1964), and cases cited.

[2] The State's use is authorized by a special land use permit. Appellant asserts that the Secretary had no authority to issue a permit for "recreation purposes." The short answer to this is that while the permit application stated it was being made not only

for the use of applicant but for "recreation by general public and for use in scientific research," the permit granted use only "for the purposes of scientific fisheries research." Thus, the issue raised by appellant is not involved in this matter. The permit grants and creates no rights in the land. However, the Secretary "is authorized and empowered, in his discretion," 43 U.S.C. § 270-1 (1970), to grant or withhold allotments. Where the public interest is be best served thereby, it is be a proper exercise of such discretion to deny an application for allotment. In the instant case the land is administered by a state governmental agency for public purposes and is devoted to public use. Under the circumstances, even if appellant had otherwise demonstrated compliance with the regulations, it would be proper to deny his application.

Appellant also alleges that the ADFG does not need all the land in the permit to carry out its research. Even assuming his assertion is so, the application would be properly rejected to the extent of the conflict. But more important -- even if the State were not using any of the land, the application could not be favorably considered; the allotment application was properly rejected because appellant's use and occupancy did not satisfy the requirements of the law.

Finally, appellant has requested a hearing. The evidence submitted by appellant and collected by BLM establish all the material facts. As outlined above, appellant's use and occupation, at most, was intermittent and not "at least potentially exclusive of others." Cumulative evidence to demonstrate appellant's non-exclusive use cannot serve to create a preference right under the Allotment Act nor is appellant entitled to a hearing as a matter of right. Pence v. Morton, A-74-138, U.S.D.C.D. of Alaska (April 8, 1975). The request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge